

A Lim Hoong Thoo v Grik Development Sdn Bhd

HIGH COURT (KUALA KANGSAR) — CIVIL SUIT NO 22-7-1992 (88)
ABDUL MALIK ISHAK J
16 JUNE 1995

B *Contract — Time — Time of the essence — No time clause in agreement — Completion subject to fulfilment of certain conditions — Whether time is of the essence*

C *Contract — Sale and purchase of land — Sum paid by purchaser — Whether repayment of a loan or part-payment of balance of purchase price*

D By a written agreement dated 3 April 1978, the plaintiff sold a piece land ('the land') to the defendant company at a purchase price of RM189,525 free from all encumbrances. Upon execution of the agreement and the memorandum of transfer in favour of the defendant company, RM50,000 was paid to the plaintiff as part-payment of the purchase price with the balance of RM139,525 payable upon approval being obtained for the conversion of the category of land use from agricultural to building land, the subdivision of the land and lay-out together with individual qualified title being issued by the proper authorities, and upon approval of road and drainage plans and building plans. The plaintiff was, at all material times, a shareholder and director of the defendant company. Upon execution of the agreement, the land was immediately transferred to the defendant company which took immediate steps to apply for conversion and sub-division of the land, but there was a delay in this because the State Government was interested in acquiring the whole land. In January 1988, the State Government aborted the plan and immediately thereafter, the plaintiff lodged a private caveat on the land which automatically froze all further actions intended by the defendant company to convert and sub-divide the land. The plaintiff sued the defendant company for the inordinate delay in complying with the agreement and prayed for an order and/or declaration that the memorandum of transfer was defeasible and be cancelled, or that the defendant company execute a memorandum of transfer of the land to the plaintiff, or that the balance of payment of RM98,525 be settled with interest at 8% per annum starting from 28 May 1978 till date of satisfaction. The plaintiff also submitted that a sum of RM41,000 paid by the defendant company was the repayment of a loan advanced to the defendant company, not part-payment of the balance purchase price as contended by the defendant company.

I **Held**, dismissing the claim:

- (1) There was no time clause in the agreement; time was never made the essence of the contract between the parties. The

plaintiff's position as a shareholder and director of the defendant company must have fostered such a close understanding between them that they saw fit not to incorporate time as of the essence of the agreement. Furthermore, the delay was not due want on default on the part of the defendant company but the abortion of the acquisition plan by the State Government and the caveat lodged by the plaintiff which effectively froze all further attempts by the defendant company to convert and sub-divide the land as required by the agreement. Accordingly, there was no inordinate delay in complying with the agreement; the plaintiff's cause of action was premature.

- (2) The plaintiff's submission that the RM41,000 was the payment of a loan given to the defendant company, not part-payment of the balance of the purchase price, was defeated by the simple fact that he had only claimed RM98,525 as payment of the balance of the purchase price. By simple calculation the defendant company had paid to the plaintiff a sum total of RM91,000 (RM50,000 + RM41,000) as part payment of the purchase price, leaving a balance of RM98,525.

[Bahasa Malaysia summary]

Melalui perjanjian bertulis bertarikh 3 April 1978, plaintif menjual sebidang tanah ('tanah tersebut') kepada syarikat defendan pada harga belian sebanyak RM189,525 bebas daripada semua bebanan. Apabila perjanjian dan memorandum pindahmilik kepada syarikat defendan disempurnakan, sebanyak RM50,000 telah dibayar kepada plaintif sebagai sebahagian daripada bayaran harga belian, bakinya sebanyak RM139,525 akan dibayar apabila kelulusan diperolehi untuk menukar kategori kegunaan tanah daripada pertanian kepada pembangunan, pembahagian tanah dan susun atur bersama dengan hakmilik sementara individu dikeluarkan oleh pihak berkuasa yang berkenaan, dan apabila mendapat kelulusan pelan-pelan jalan dan sistem saliran dan pelan pembangunan. Plaintif, pada semua masa penting, adalah pemegang saham dan pengarah syarikat defendan. Apabila perjanjian itu disempurnakan, tanah tersebut dengan sertamerta dipindahmilik kepada syarikat defendan yang mengambil tindakan segera untuk memohon penukaran dan pembahagian tanah tersebut. Terdapat kelewatan dalam proses ini kerana kerajaan negeri berminat untuk mengambil keseluruhan tanah tersebut. Pada bulan Januari 1988, kerajaan negeri membatalkan rancangan itu dan sertamerta selepas itu, plaintif memasukkan kaveat persendirian ke atas tanah tersebut yang secara automatik membekukan semua tindakan lanjut yang ingin dilakukan oleh syarikat defendan untuk menukar dan membahagikan tanah tersebut. Plaintif menyaman syarikat defendan kerana kelewatan yang melampau dalam mematuhi perjanjian dan memohon suatu perintah dan/atau deklarasi bahawa memorandum pindahmilik itu boleh disangkal dan dibatalkan, atau bahawa syarikat defendan menyempurnakan memorandum

- A pindahmilik tanah tersebut kepada plaintif, atau bahawa baki bayaran sebanyak RM98,525 diselesaikan dengan faedah pada kadar 8% setahun bermula daripada 28 Mei 1978 hingga tarikh pelangsaan. Plaintif juga menghujahkan bahawa jumlah sebanyak RM41,000 yang dibayar oleh syarikat defendan adalah pembayaran balik satu pinjaman yang diberikan kepada syarikat defendan, bukan bayaran sebahagian harga belian seperti yang ditegaskan oleh syarikat defendan.
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Diputuskan, menolak rayuan:

- C (1) Tidak ada fasal mengenai masa dalam perjanjian itu; masa tidak pernah dijadikan intipati kontrak di antara pihak-pihak itu. Kedudukan plaintif sebagai pemegang saham dan pengarah syarikat defendan mesti telah menggalakkan persefahaman yang begitu rapat di antara mereka sehinggakan mereka menganggapnya sesuai untuk tidak memasukkan masa sebagai intipati perjanjian. Tambahan pula, kelewatan itu bukan disebabkan oleh keingkaran syarikat defendan tetapi oleh pembatalan rancangan pengambilan oleh kerajaan negeri dan kaveat yang dimasukkan oleh plaintif yang dengan berkesannya membekukan semua cubaan-cubaan lanjut oleh syarikat defendan untuk menukar dan membahagikan tanah tersebut seperti yang dikehendaki oleh perjanjian itu. Ekoran dari itu, tidak ada kelewatan yang melampau dalam mematuhi perjanjian itu; kausa tindakan plaintif adalah terlalu awal.
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- E (2) Penghujahan plaintif bahawa jumlah sebanyak RM41,000 itu adalah pembayaran balik satu pinjaman yang diberikan kepada syarikat defendan, bukan bayaran sebahagian daripada baki harga belian, ditewaskan dengan fakta yang mudah bahawa belian hanya menuntut RM98,525 sebagai bayaran baki harga belian. Dengan pengiraan yang mudah syarikat defendan telah membayar kepada plaintif sejumlah RM91,000 (RM50,000 + RM41,000) sebagai bayaran sebahagian harga belian, yang meninggalkan baki sebanyak RM98,525.]
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Notes

For cases on discussion of 'time' in a contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2256-2275; [1995] *Mallal's Digest* 518; [1996] *Mallal's Digest* 598.

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Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47 (distd)
Curtis v Chemical Cleaning and Dyeing Co Ltd [1951] 1 KB 805,
 [1951] 1 All ER 631 (folld)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, [1980] AC 331 (refd)
Farrel v Secretary of State for Defence [1980] 1 All ER 166, [1980] 1 WLR 172 (folld)

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- Ghazali bin Salleh & Anor v Public Prosecutor* [1993] 2 AMR 2037 (folld) A
- Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24 (distd)
- Jamshed Khodaram Irani v Burjorji Dhunjibhai* AIR 1915 PC 83 (refd)
- KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (folld) B
- L' Estrange v F Graucob Ltd* [1934] 2 KB 394 (folld)
- Miskinah bte Jaya & Ors v Mohamed bin Salleh & Anor* [1984] 1 MLJ 187 (refd)
- Saminathan v Papa* [1981] 1 MLJ 21 (refd)
- Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 (refd)
- Wakefield Local Board v Lee* (1876) 1 Ex D 336 (refd) C
- Wong Ah Sing v Government of Singapore & Ors* [1968] 1 MLJ 1 (refd)
- Wong Eng v Chock Mun Chong & Ors* [1963] MLJ 204 (refd)

Legislation referred to

National Land Code 1965 s 340 D

Chan Hoe Cheng (KC Lai & Co) for the plaintiff.
A Iruthaya Raj (Raj Selva & Co) for the defendant.

Abdul Malik Ishak J: In para 7 of the statement of claim, the plaintiff sought the following prayers: E

- (a) An order and/or declaration that transfer presentation Bil: 110/78 Pindahmilik Jilid 4 Folio 44 is defeasible and that pursuant thereto;
- (b) An order that the aforesaid registration of transfer and all memorial of registration be cancelled; F
- (c) Alternatively, an order that the defendant do execute a good and registrable memorandum of transfer of the said land to the plaintiff free of all liens, encumbrances or other adverse claims and that in lieu of execution of the said transfer by the defendant the Senior Assistant Registrar be empowered to execute a transfer of the said land to the plaintiff; G
- (d) Alternatively to (a), (b), and (c), the sum of RM98,525.00;
- (e) Interest at the rate of 8% per annum on the aggregate sum adjudged from the 26 May 1978 till date of satisfaction;
- (f) Such further or other relief as this Honourable Court deems fit; and H
- (g) Costs of this suit.

The facts that led to this civil suit may be summarized as follows.

The plaintiff was the registered owner of a piece of land comprised in EMR 2141 Lot 2440, in the Mukim of Grik, in the District of Upper Perak of acreage 9 acres 3 roods 36 poles ('land'). By a written agreement dated 3 April 1978 (see 'AB 1' at page 1), the plaintiff sold the land to the defendant company at a purchase price of RM189,525 free from all I

A incumbrances. Upon execution of the written agreement and the execution of the memorandum of transfer in favour of the defendant company, the plaintiff was paid a deposit of RM50,000 as part payment of the purchase price. The balance of the purchase price in the region of RM139,525 was payable 'upon the fulfillment of the following conditions, that is to say approval being obtained for the conversion of the category of land use from agricultural to building land, sub-division of the said land and lay out being approved together with individual Qualified Titles being issued by the proper authorities and upon approval of road and drainage plans and building plans' (see cl 2 (b) of the written agreement).

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C By cl 3 of the written agreement, upon execution of the said agreement, the land was to be immediately transferred into the name of the defendant company. That written agreement and the memorandum of transfer (exhibit 'D2') were prepared by a lawyer — one Mr Ong Teng Sam (SD2), a legal practitioner in Taiping of 20 years' standing — who testified that he had explained the terms of that written agreement to the parties before they affixed their signatures thereto. Currently, the land is registered in the name of the defendant company. It is germane to mention here that before the written agreement was signed by the parties, the plaintiff who all along the shareholder and a director of the defendant company. Under cross-examination, Mr Leong Sau Guen (SD3), the company secretary, testified that since the inception of the defendant company, the plaintiff had that kind of interest in the defendant company. In fact, in the course of the trial, there is evidence emanating from the defendant's witnesses that the plaintiff still holds that esteemed position in the defendant company. A witness by the name of Ng Ah Boy @ Ng Leng Yong (SD5), who is also a shareholder and director of the defendant company, testified under examination-in-chief that he is still on talking terms with the plaintiff despite the court case. Reverting back to the facts of the case, the defendant company took immediate steps to apply for conversion and sub-division and this was done on 20 January 1979 (see exhibit 'D5'). But somehow, by a stroke of misfortune, the approval was delayed. It transpired that the State Government of Perak was interested in acquiring the whole portion of the land. The notice of intended acquisition dated 24 February 1982 vide Form E was finally extended to the defendant company (see exhibit 'D6'). This must have stifled the defendant company's plans to develop the land. Several meetings were held by the defendant company's representative and the officers at the Land Office and after anxiously waiting for that acquisition exercise, the State Government of Perak decided to abort their plan of acquiring the land, much to the relief of the parties (see exhibit 'D7').

I Before the applications for conversion and sub-division of the land in question could be revived, the plaintiff lodged a private caveat on that land in 1988. Hogg in his treatise *Registration of Title to Land Throughout the Empires* (1920) at p 189 spoke of a caveat in this manner:

A caveat is in the nature of a statutory injunction, and is a means of conveying notice to persons who propose to deal with the owner that there are other claims affecting the property; on itself a caveat makes a claim or right neither better nor worse, but marks a point of time at which the merits of competing interests may be judicially determined. A

Lord Diplock in the Privy Council case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 in almost the same vein said (at p 214): B

The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title in the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. C

Bluntly put, the private caveat on the land automatically froze all further actions intended by the defendant company to convert and sub-divide the land as set out in the agreement. In 1988, the plaintiff filed this civil suit in the High Court, Ipoh, Perak which was finally transferred to the High Court, Taiping (Kuala Kangsar), Perak. D

It was argued that there was inordinate delay on the part of the defendant company to comply with cl 2(b) of the written agreement and as an implied term the speed within which the defendant company should convert and sub-divide the land must necessarily be within a reasonable time. Reliance was placed on the passages appearing in the decision of Lord Jenkins in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47, especially at p 49, where his Lordship said: E

Their Lordships may now return to the question exhaustively debated before them and in the Courts below:— Within what period of time did the agreement (read in conjunction with the purchaser's solicitors' letter of the 4th May 1956) require the condition contained in clause 4 to be performed? The answer to that question must plainly depend upon the true construction of the agreement, or in other words upon the intention of the parties as expressed in, or to be implied from, the language they have used. F

But, subject to this overriding consideration, their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: G

- (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; H
- (ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;
- (iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles. I

- A With respect, the facts in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* are poles apart from the facts in the present case. There the facts were that by a conditional agreement dated 8 November 1955, the vendor Aberfoyle Plantations Ltd agreed to sell an estate, consisting of some 1,336 acres of rubber plantations, to the purchaser Khaw Bian Cheng. At the date of the agreement the vendor had a good title to 1,154 acres, but its title to the other 182 acres depended on the success of its negotiations for the renewal of seven previously expired leases. Clause 2 of the agreement provided that the purchaser would pay certain deposits at certain dates and the balance on or before 30 April 1956. Clause 4 provided that 'the purchase is conditional on the vendor obtaining ... a renewal of the seven leases ... so as to be in a position to transfer the same to the purchaser ... and if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made.' Clause 9 provided that completion of the purchase was to take place on or before 30 April 1956 and that upon the purchaser paying the balance of the purchase price the vendor should 'as soon as possible thereafter' execute a proper transfer of the property to the purchaser. The purchaser duly paid the deposits required under cl 2, but the vendor had not by 30 April 1956, fulfilled the condition stipulated in cl 4 by obtaining a renewal of the leases. The time for obtaining the renewal of the leases was subsequently extended by the purchaser to 31 May 1956.
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- E The condition being admittedly still unfulfilled, the purchaser on 11 June 1956 brought this action against the vendor claiming the return of the deposits paid under cl 2. In the present case, cl 2(b) of the written agreement as set out in the early part of this judgment, just like the case of *Saminathan v Pappa* [1981] 1 MLJ 121, has no time clause and time was not the essence of the contract. This must surely be the distinguishing feature of the present case with that of *Aberfoyle Plantations Ltd v Khaw Bian Cheng*. The present case is also different, on the facts, with that of *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24, 'where time was not merely of the essence of the contract but fulfillment of the promise by the appellant to obtain the approval on or before 31 December 1977 was a condition precedent of the whole contract' (per Mohamed Azmi SCJ at p 30). It is pertinent to point out that the decision of his Lordship Mohamed Azmi SCJ was affirmed by Lord Bridge Harwich (see *Jaafar bin Ibrahim v Gan Kim Kin* [1987] 3 MLJ 109) when the matter went up on appeal to the Privy Council.
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- H I am aware of the case of *Jamshed Khodaram Irani v Burjorji Dhunjibhai* 1915 AIR PC 83 where it was held that equity will look at the substance rather than the letter of the agreement to ascertain whether time is of the essence. Looking at the substance of the written agreement in the present case, one cannot help but see the position of the plaintiff as not only the shareholder but also the director of the defendant company. That kind of relationship must have fostered a close understanding between all five directors of the defendant company that they all saw it fit not to incorporate 'time' as the essence of their contractual relationship. This friendly attitude is clearly reflected by the willingness of the defendant company to fulfill their part of the bargain when Ng Chee Meng @ Ng Kok Meng (SD4) declared that 'syarikat
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defendan masih sedia bayar hanya belian tanah tersebut iaitu membayar baki hanya belian tanah tersebut.' That cordial relationship between the parties was also seen when Ng Chee Meng @ Ng Kok Meng (SD4) testified that the land was not mortgaged to any party even up to the date of the hearing. One must not lose sight of paras 3 of both the statement of defence and the amended statement of defence where it was averred that the plaintiff was still in occupation of the land and received the income and profits thereto and this point was amplified by Ng Chee Meng @ Ng Kok Meng (SD4) in his testimony. Though the plaintiff denied that he occupied the land and alleged that the rubber trees were too old to gain any mileage from it, yet I cannot help but observe that the defendant company had complied with the rules in regard to pleadings in that they have grounded their defence in accord with their pleadings (see *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124; *Wong Eng v Chock Mun Chong & Ors* [1963] MLJ 204; *Wong Ah Sing v Government of Singapore & Ors* [1968] 1 MLJ 1; and *Miskinah bte Jaya & Ors v Mohamed bin Salleh & Anor* [1984] 1 MLJ 187 where the principle of the sanctity of sticking to one's pleadings was highlighted).

I am not unmindful of what Grove J said in *Wakefield Local Board v Lee* (1876) 1 Ex D 336 at 343 that 'except in mathematics, it is difficult to frame exhaustive definitions of words' in interpreting words. Fortunately, I need not go to that extent in interpreting cl 2 (b) of the written agreement because its plain grammatical language means what it says. The conditions must be fulfilled before the balance of the purchase price would be paid to the plaintiff. The delay as explained earlier was due to the abortive acquisition exercise. It was certainly not due to the wanton default of the defendant company. The State Government of Perak decided against the acquisition on 8 January 1988 (see exhibit 'D7') and immediately thereafter the plaintiff lodged the private caveat on the land and this caused a total stop to the defendant company's attempts at converting and sub-dividing the land. The plaintiff must have known of the intended acquisition exercise and the abortiveness thereto by his dual roles in the defendant company — that of a shareholder and a director. Evidence was led through the company secretary that the plaintiff attended:

- (a) the directors' meeting on 4 February 1988 (see exhibit 'D13');
- (b) the first Annual General Meeting of the defendant company on 13 June 1979 (see exhibit 'D14');
- (c) the adjourned first Annual General Meeting of the defendant company on 30 September 1988 (see exhibit 'D15');
- (d) the second Annual General Meeting of the defendant company on 12 December 1980 (see exhibit 'D16');
- (e) the third Annual General Meeting of the defendant company on 17 December 1981 (see exhibit 'D17');
- (f) the fourth Annual General Meeting of the defendant company on 29 September 1982 (see exhibit 'D18');

- A (g) the fifth Annual General Meeting of the defendant company on 28 October 1983 (see exhibit 'D19');
- (h) the sixth Annual General Meeting of the defendant company on 31 December 1984 (see exhibit 'D20');
- (i) the adjourned sixth Annual General Meeting of the defendant company on 2 February 1985 (see exhibit 'D21');
- B (j) the eighth Annual General Meeting of the defendant company on 11 September 1986 (see exhibit 'D23');
- (k) the ninth Annual General Meeting of the defendant company on 3 October 1987 (see exhibit 'D24'); and
- C (l) the adjourned ninth Annual General Meeting of the defendant company on 5 November 1987 (see exhibit 'D25').

In my judgment, there is no time clause in the present case and time was never made the essence of the contract between the parties. Consequently, I must rule that the cause of action was premature.

- D Next, it was submitted by the plaintiff that RM41,000 was the payment a loan advanced to the defendant company. An opposite submission was made by the defendant company to the effect that that sum was meant as part-payment to the balance sum and this was incorporated in the amended statement of defence. This calls for a
- E scrutiny of exhibit 'P1' and it is appropriate to reproduce it in verbatim form. It is as follows:

An Agreement made the 10th day 12, 1979 between Lim Hoong Thoo @ Ah Lai NRIC 0314365 of No: 17, Batu Dua, Grik, Perak And Grik Development Sdn Bhd, 225 Kota Road, Taiping, Perak.

- F Lim Hoong Thoo @ Ah Lai given (gives) a loan of \$41,000.00 (Dollars Forty One Thousand Only) to Grik Development Sdn Bhd.

Hereinafter Lim Hoong Thoo @ Ah Lai and Grik Development Sdn Bhd agreed to sign as follows:

- sgd (Chinese character)
- G Lim Hoong Thoo @ Ah Lai
- NRIC No: 0314365

Sgd
Tan Kim Hock NRIC No: 0314203

- H Sgd
- Ng Kok Meng @ Ng Chee Meng
- NRIC No: 2072278

Sgd
Hwang Kok Lam @ Ng Oy Kon

- I NRIC No: 2070938

Sgd (Chinese character)
Ng Leng Hong @ Ng Ah Boy
NRIC No: 1694340

Tan Kim Hock (SD1) admitted signing exhibit 'P1' but he stated that that amount was part-payment of the balance sum. Under cross-examination he stated that the defendant company did not borrow that money from the plaintiff. Ng Chee Meng @ Ng Kok Meng (SD4) testified that the defendant company never borrowed from the plaintiff and of pertinence was his evidence that he did not sign exhibit 'P1' and that the signature that appeared on exhibit 'P1' appeared like his. In this state of doubt, I invoked s 73(2) of the Evidence Act 1950 and directed Ng Chee Meng @ Ng Kok Meng (SD4) to give samples of his signatures on a piece of paper as provided by the court (see *Ghazali bin Salleh & Anor v Public Prosecutor* [1993] 3 AMR 2037; [1993] 3 CLJ 638). After comparing the two signatures (between the one appearing on exhibit 'P1' and the other as per the sample signatures of the witness), and without the assistance of a handwriting expert, I am constrained not to form any opinion nor arrive at any conclusion on the subject matter (see Sarkar & Ejaz *Law of Evidence*, (3rd Edn, 1990) vol 1, p 707. Be that as it may, Ng Chee Meng @ Ng Kok Meng (SD4) testified further, under cross-examination, that exhibit (P1) was not prepared on the defendant company's letterhead and when pressed to produce the defendant company's letterhead, he merely replied:

Dalam fail yang bersama saya tidak ada letter head Syarikat. Kadang kala saya tidak pakai letter head. D5 pun saya tidak pakai letter head.

Ng Leng Yong @ Ng Ah Boy (SD5) too denied signing exhibit (P1) and he reiterated the same version that the defendant company did not borrow from anyone.

Now, a perusal of exhibit 'P1' shows in the second paragraph thereof that the plaintiff 'loaned' that amount to the defendant company. Although, the accountant (Peter Ho Kok Wai — SD6) testified that no advances were recorded in the books from the plaintiff to the defendant company for the year 1979 (the same year when the loan was purportedly given to the defendant company) and that the account books did not show the existence of exhibit 'P1', yet one vital question arises: Why must the defendant company make a further part payment of RM41,000 to the plaintiff as this is not required under the written agreement unless, of course, such payment was made to repay the loan as advanced by the plaintiff? I am mindful of the letter from Messrs Jeffrey Tan & Co, the previous solicitors for the plaintiff (see letter dated 7 September 1988 in bundle 'AB1' at p 4) where it adverted to the outstanding purchase price to be RM98,525 which by simple calculation would have taken into account RM50,000 that was paid as a deposit as adverted to earlier plus another RM41,000 in the form of part-payment. On the authenticity of exhibit 'P1', I need to rely on *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, where Scrutton LJ said (at p 403): 'When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.' Denning LJ said bluntly in *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 that 'the signature is irrefragable

- A evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation'. Here, unfortunately the defendant company did not allege that those signatures appearing in exhibit (P1) were obtained by fraud or misrepresentation except to submit that exhibit (P1) was not genuine. If it was true that Ng Chee Meng @ Ng Kok Meng (SD4) and Ng Leng Yong @ Ng Ah Boy (SD5) did not sign exhibit (P1), the defendant company must prove that allegation by calling a handwriting expert. This was not done. In the circumstances, the learned counsel for the plaintiff submitted that I had no choice but to rule that RM41,000 was a loan advanced by the plaintiff to the defendant company. This meant that the balance of the purchase price that was still outstanding was RM139,525, so submitted the learned counsel for the plaintiff. All these pieces of evidence in regard to exhibit (P1) have been set out in some detail to show the magnitude of the allegations by the defendant company that exhibit (P1) was concocted and not a genuine piece of document. The plaintiff too rightly stressed those facts adumbrated earlier to show that exhibit (P1) existed in its original form which would show that the repayment of RM41,000 was in the form of a debt due and not part payment of the balance of the purchase price as alleged. There is a way to resolve the impasse which both parties had overlooked. The plaintiff's statement of claim as seen in the early part of this judgment sought for the return of RM98,525 (see para 7(d)) and this is the answer to the divergent submissions in regard to exhibit (P1). The plaintiff's various submissions in regard to exhibit (P1) must fall flat to the ground as they run counter to the statement of claim. The sum of RM98,525 sought for by the plaintiff must surely mean that the plaintiff had agreed that RM41,000 was part-payment of the balance of the purchase price. By simple arithmetic, the defendant company has paid to the plaintiff a sum total of RM91,000 as part payment of the purchase price (RM50,000 plus RM41,000 equals RM91,000). This is the correct deduction to make in view of the failure of the plaintiff to mould his case within the framework of his pleadings. The accountant who gave evidence was categorical that exhibit (P1) did not fit into the accounts of the defendant company at all. If exhibit (P1) was in fact genuine, it should easily fit into the defendant company's account. I hold that the accountant gave evidence as an impartial and neutral individual. His credibility was par excellence. The letter from Messrs Jeffrey Tan & Co too supported the defendant company's version that exhibit (P1) adverted to a repayment and not a loan as alleged. It is my judgment and it is my finding of fact that RM98,525 was the outstanding sum that was due to the plaintiff under the written agreement.

I It would be an exercise in extreme futility to model one's case outside the ambit of one's pleadings. One must introduce evidence within the range of one's pleadings and the proper use of such device would certainly shorten the length of the hearing and lessen the consequential costs. The importance of pleadings cannot be doubted and, towards this end, Lord Edmund-Davies rightly observed in *Farrell v Secretary of State* for defence [1980] 1 All ER 166 at p 173:

It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as a 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

What is not pleaded should not be ventilated nor argued as an element of surprise would creep in and that in turn would prevent the other party to rebut the allegation. Raja Azlan Shah CJ (Malaya) (as HRH then was) in erudite terms observed in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 at p 12:

As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

The general principles on pleadings as briefly set out above would aptly apply to the plaintiff. Without support of the statement of claim to say that the RM41,000 was in the form of a loan and not part-payment of the balance of the purchase price, the plaintiff's allegations in regard to exhibit (P1) would simply collapse like a deck of cards.

It is now beyond dispute, by virtue of s 340 of the National Land Code, that the defendant company's title to the land is indefeasible. That indefeasibility may be defeated by fraud or misrepresentation or where registration was obtained by means of an insufficient or void instrument. Unfortunately, the exceptions to the concept of indefeasibility were not pleaded in the statement of claim and this meant that the defendant company's title to the land was indeed indefeasible. Incidentally, on perusal of the evidence not a shred of fraud or misrepresentation has been produced. On the authority of *Saminathan v Pappa*, fraud must be established by the plaintiff, in so far as the title to the land is concerned, beyond reasonable doubt. As an unpaid vendor, the plaintiff has no right to apply to this court to set aside the transfer. Lord Diplock in delivering the judgment of the Board in *Saminathan v Pappa* said at p 127:

Miss Pappa's failure to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title under s 340(2)(a) [of the National Land Code].

The scenario of the whole case can best be summed up as an exercise in haste by the plaintiff to seek the prayers which he sought to obtain.

- A** As a shareholder and a director of the defendant company, the plaintiff must know and cannot be said not to know the 'goings on' in the defendant company. The plaintiff's cause of action was nothing but premature in the circumstances. He has no choice but to wait patiently and, as a director, he could perhaps steer the defendant company to expeditiously comply with cl 2(b) of the written agreement and, if that happens, he would strike 'pay dirt', so to speak.
- B**

The conclusion is inevitable. The plaintiff's claim must be dismissed with costs.

Order accordingly.

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Reported by Zahid Taib

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